No. 08-1515

Supreme Court, U.S.
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In The
Supreme Court of the United States

GOLDEN GATE RESTAURANT ASSOCIATION,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

SAN FRANCISCO CENTRAL LABOR COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION ("SEIU"), LOCAL 1021; SEIU UNITED HEALTHCARE WORKERS-WEST; and UNITE HERE! LOCAL 2,

Intervenors/Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR ZAZIE AND MEDJOOL RESTAURANTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

San Francisco's universal health care ordinance contains two interlocking components: a comprehensive public health care program available to all uninsured residents at sliding scale fees, and a general health care spending requirement for medium and large employers. Employers may comply with the spending requirement either through their own health care plans, or by paying into the public program. If employers choose the public option, their employees receive a substantial discount on the health care services available through that program. The question presented is:

Does ERISA preempt the portion of San Francisco's universal health care ordinance that imposes a general health care expenditure requirement on medium and large employers, where every employer may readily comply without adopting an ERISA plan or altering an existing plan, and where the option of paying into the public program is a rational choice for employers rather than a penalty?

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INTEREST OF *AMICI CURIAE*[1]

The San Francisco Health Care Security Ordinance ("Health Care Ordinance" or "ordinance"), S.F. Admin. Code §14 *et seq.*, levels the economic playing field for businesses that wish to provide health insurance coverage for their employees. Without the Health Care Ordinance, restaurants that aspire to cover their employees would be forced to abandon their health care benefits or be driven out of business because of the difficulty in competing with other restaurants that do not spend money on health care. The Golden Gate Restaurant Association ("GGRA" or "Petitioner") does not represent the interests of all the restaurants in San Francisco, nor does it embody the interests of restaurant employees, taxpayers, and the restaurant-going public. Indeed, *amicus* Medjool is a member of the GGRA but disagrees with the GGRA's position in this case.

The Health Care Ordinance serves the interests of *amici curiae*, Zazie and Medjool, medium-sized restaurants in San Francisco, because it enables these restaurants to act responsibly by providing health insurance coverage for employees while

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the preparation and submission of this brief. *Amici* notified counsel of record for each party in a timely manner 10 days prior to filing, and letters of consent have been filed with the Clerk of the Court.

maintaining their ability to compete economically. The ordinance further serves the interests of Zazie and Medjool by enabling the restaurants to protect the health of both employees and customers, by ensuring that employees have access to affordable health care services, and by helping to prevent episodes of food contamination by ill employees. *Amici* believe that not only is the ordinance in their own interest but it is in the interest of all restaurants and San Francisco residents, because it allows businesses to compete in a fair and level context while also ensuring that all San Francisco workers have access to affordable health care.

This brief grounds its arguments in the real-world experience of Zazie. Medjool joins the brief because it too supports the Health Care Ordinance and disagrees with GGRA's stance. The arguments set forth on behalf of Zazie apply equally to Medjool, with the minor difference that Medjool, which already provided health insurance for its full-time employees before the ordinance took effect, now also pays the City for the rest.

STATEMENT

Zazie is a neighborhood restaurant in San Francisco and a medium-sized[2] "covered employer" as

[2] A "medium-sized" business means a business with at least twenty employees. S.F. Admin. Code §14.1(b)(3), (b)(12); OLSE

(Continued on following page)

defined in the Health Care Ordinance and the Office of Labor Standards Enforcement (OLSE) Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance. S.F. Admin. Code §14.1(b)(3) *et seq.*; OLSE Reg. No. 2.

The Health Care Ordinance, passed in July 2006, has two central components: Healthy San Francisco, a city-administered health care program that provides access to health care services for specified San Francisco residents, and a mandatory employer health care expenditure requirement. This expenditure requirement covers all employees who work more than eight hours a week and is pro-rated by hours worked, based on a forty-hour work week. S.F. Admin. Code §14.1(b)(2)(c). Covered employers like Zazie must spend at least $1.23 or $1.85 (depending on employer size) on health care for each hour paid to each of their covered employees on a quarterly basis. S.F. Admin. Code §14.1(b)(8)(b).[3] Employers may spend the funds directly on health care services or pay into San Francisco's program. S.F. Admin. Code §14.1(b)(2); OLSE Reg. No. 3.

Reg. No. 2.2(A)(1), (C)(2). Businesses with fewer than twenty employees are considered "small" businesses and are exempt from the Health Care Ordinance. S.F. Admin. Code §14.1(b)(15); OLSE Reg. No. 2.2(C)(3).

[3] In 2010, the rate will increase to $1.31 for medium-sized employers. S.F. Admin. Code §14.1(b)(8)(c).

The calculation, which involves multiplying hours by $1.23, is straightforward. Zazie's covered employees work approximately 7,500 hours per quarter so, to comply with the ordinance, the restaurant must spend just over $9,225 per quarter ($1.23 x 7,500), or $36,900 per year, on health care. Zazie is permitted to average its expenditures over employee hours worked because it offers uniform health coverage to its employees. *See* OLSE Reg. No. 6.2(B)(1).

Zazie complies with the health care spending requirement by providing health insurance for its employees through a Kaiser Permanente ("Kaiser") managed care plan for which it pays approximately $50,000 in annual premiums for covered employees. The restaurant easily covers these payments through a $1 surcharge for every restaurant customer.

The Golden Gate Restaurant Association (GGRA) filed suit in 2006 to block the ordinance's employer expenditure requirement on the grounds that it is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*, and has now petitioned for a writ of certiorari in an attempt to undercut the progress made in San Francisco since the implementation of the ordinance in January of 2008.

SUMMARY OF ARGUMENT

What motivates the GGRA and its allies is a desire to avoid spending money on providing health care to low-wage employees. Because they cannot reasonably argue that ERISA prevents local governments from enacting general employer expenditure requirements, Petitioner its *amici* instead make greatly exaggerated arguments about the administrative requirements associated with the Health Care Ordinance. Despite parties having had full opportunity for discovery, the record contains no evidence of any burden that would support Petitioner's position, rendering this case a flawed vehicle for consideration of Petitioner's arguments.

This brief sets forth the real-world experience of a San Francisco restaurant, Zazie, which supports the Health Care Ordinance. Zazie credits the ordinance for allowing it to offer health insurance to its employees without being undercut by competitors that do not want to share the responsibility for the well-being of their workers. Zazie's stance is not atypical. In a recent survey by Small Business Majority California, the overwhelming majority (80%) of business owners employing fewer than 100 employees expressed support for employer contributions to employee health care.

Zazie's positive experience with the Health Care Ordinance belies Petitioner's arguments and underscores the *de minimis* nature of the administrative tasks involved in compliance. Moreover, while

Petitioner and its allies engage in a speculative exercise about how difficult it might be for employers to comply with hypothetical copycat ordinances that might some day pass in other jurisdictions, Zazie presents evidence about what employers in San Francisco actually do. Zazie's experience demonstrates that even if similar ordinances were to pass elsewhere, employers would have little difficulty complying, just as they currently routinely comply with disparate minimum wage, tax, leave, and other laws.

ERISA was never intended to shield employers from mere expenditure requirements. ERISA was born of a legislative compromise that incorporated a preemption provision into what remains at heart a worker protection law.[4] But Petitioners push for an imbalanced reading of ERISA in which the reach of such preemption would extend beyond what Congress intended. ERISA's concerns about uniformity are limited to protecting employers from the expense and inconvenience of having to alter their employee benefit plans, not to eliminate the possibility that employers might have to tweak their payroll process slightly to comply with laws that require minimum

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[4] As explained in *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 326-327 (1997), "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."

expenditures on employee benefits. *See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 657, 661 (1995); *Massachusetts v. Morash*, 490 U.S. 107, 108 (1989); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). The Health Care Ordinance's expenditure requirement and the minimal administrative steps involved in complying are permissible under ERISA.

For these reasons, the Court should deny the petition.

ARGUMENT

I. COMPLYING WITH THE HEALTH CARE ORDINANCE IS EASY AND LEAVES ROOM FOR EMPLOYER CHOICE.

The mere fact that a law regulating employee benefits creates administrative requirements on employers does not subject it to federal preemption. *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 795 (9th Cir. 1996). To the extent Petitioner argues that the Health Care Ordinance is preempted because it imposes burdensome recordkeeping, reporting, and other administrative requirements on employers, however, it must produce evidence in support of that argument. It has failed to do so. Nothing in the record suggests that complying with the ordinance is either burdensome or difficult. Thus, this factual record would not provide a basis for the Court to decide whether a

law may be preempted by ERISA based on employer administrative requirements.

A. Complying with the Health Care Ordinance Involves Minimal and Simple Administrative Tasks.

Through misleading and theoretical arguments, Petitioner and its *amici* greatly exaggerate the administrative requirements associated with the Health Care Ordinance. Zazie's actual responsibilities under the ordinance are straightforward and not time-consuming.

Threshold coverage determinations, which Petitioner mischaracterizes as complex, are in fact simple. When the Health Care Ordinance went into effect, Zazie's owner knew the restaurant was a "covered employer:" it typically employs a staff of thirty, more than the twenty employee threshold. S.F. Admin. Code §14.1(b)(12); OLSE Reg. No. 2.2(A), (C)(2). Two of Zazie's employees, the General Manager and the Chef, are deemed managerial under California and federal law and therefore fall under the ordinance's "managerial, supervisorial, or confidential" exemption. S.F. Admin. Code §14.1(b)(2)(d); *see* IWC Wage Order, 8 C.C.R. §11050(1)(B)(1); 29 C.F.R. §541.201. The rest are hourly employees clearly covered by the ordinance. When the ordinance went into effect, Zazie – which was already providing insurance to the two salaried employees who would have been exempt – ascertained which hourly

employees received health care services from another source and purchased a Kaiser plan for the rest.

The process for new employees is equally straightforward. Zazie calendars the new employee's health insurance start date ninety days after the date of hire. S.F. Admin. Code §§14.1(b)(2), 14.3(a); OLSE Reg. Nos. 3.1(A)(2), 6.1(B). Zazie's owner likens it to calendaring the end of a probationary period and appreciates the ninety day window for that reason. When the period ends, Zazie completes a one-page health insurance enrollment form, faxes it to Kaiser, and the new employee's insurance starts on the first of the following month.

Tracking hours worked is not difficult. Like any other employer, Zazie records employee hours worked for payroll purposes. Zazie uses a computerized time clock. Employees swipe their time card when they start and stop work, and the data go directly to Zazie's computer. Like all San Francisco restaurants Zazie's owner knows, Zazie uses a payroll company to process its bi-weekly payroll. Zazie reports employee hours worked to its payroll company, ADP, which for a small fee provides an array of services. The need for these services predates the Health Care Ordinance and the ordinance has not caused the payroll processing fee to increase. ADP ensures compliance with the latest regulations regarding federal, state, and local taxes, calculates Zazie's payroll with appropriate deductions and withholdings for all jurisdictions, notifies the state as required concerning new hires, prepares paychecks, manages Zazie's Unemployment

Insurance, calculates and reports back Workers' Compensation premiums, calculates and produces W2s and 1099s, and sends Zazie updated federal and state labor law posters. ADP also allows online access to comprehensive pay histories and provides a quarterly report to Zazie showing individual and gross employee hours worked. This report is the only payroll data required to comply with the ordinance and Zazie needs it for pre-existing purposes. *See, e.g.*, Cal. Labor Code §226. Zazie treats payroll services as a business necessity and the Health Care Ordinance has not prompted any change in its practice or additional payroll expense.

Tracking how much Zazie spends on employee health care each month has proven equally straightforward. Zazie receives a monthly bill from Kaiser that shows the total premium owed, with a breakdown by employee. Zazie mails a premium check to Kaiser and files the stub with the Kaiser bill. Zazie keeps records of all health care expenditures using QuickBooks accounting software, which it also used before the ordinance went into effect. When Zazie pays for other health care services, such as occasional chiropractic care for its employees, Zazie tracks, records and files those expenditures in the same way. Every quarter, Zazie need only compare its quarterly health care expenditures to the required level to

know it has complied with the Health Care Ordinance.[5]

The Health Care Ordinance is an exceedingly simple expenditure requirement. For employers that, like Zazie, provide uniform health coverage to their employees, the ordinance merely requires that the "*average* expenditure rate per employee" meet or exceed the employer expenditure requirement. OLSE Reg. No. 6.2(B)(1) (emphasis supplied). In other words, to determine the amount it must spend on health care services, after subtracting the hours of ineligible or exempt employees,[6] Zazie must simply multiply the quarterly number of hours its employees worked, as reported by ADP, by $1.23. This calculation takes less than five minutes and Zazie could ask ADP to do it.[7] Zazie then compares the required

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[5] Had Zazie chosen to pay into Healthy San Francisco, instead of verifying that the Kaiser premiums and other expenditures meet the legal requirement, Zazie would simply calculate its required expenditure level and mail a quarterly check to the City of San Francisco. This is what Medjool does.

[6] Ineligible or exempt employees include those who have not yet been employed for ninety days, who work fewer than eight hours per week, or who waive the expenditure requirement because they are receiving health care services through another employer. S.F. Admin. Code §14.1(b)(2), (b)(2)(c); (b)(2)(h); OLSE Reg. No. 3.1(A)(2), 3.1(A)(3)(b), 3.2(A)(5).

[7] Because full-time employees and part-time employees have slightly different health plans with different co-payments, Zazie must perform the calculation twice. This is also true for Medjool, which provides Kaiser coverage for some employees and pays the City for the rest. This adds an insignificant amount of time and effort.

expenditure to the amount it actually spends on employee health care. If Zazie were spending less than required, it would pay the difference to the City of San Francisco, which would entitle Zazie's employees to additional benefits through the City's program. Because Zazie consistently spends more than required, it need do nothing other than report compliance annually.

Reporting takes Zazie no more than thirty minutes per year. Every year, the City of San Francisco mails Zazie a simple, one-page Mandatory Annual Reporting form (App. 1) that asks how many hours the restaurant's employees worked, and how much it spent on health care for them. Zazie returns the form with its annual business registration submission to the City. *See* S.F. Admin. Code §14.3(b); OLSE Reg. No. 7.3. That is all Zazie need do to comply.

B. The Health Care Ordinance Overlaps with and Requires Less Effort than Other Existing Labor and Employment Laws.

Amicus Washington Legal Foundation's approach is to break down each element of compliance into enough detail to crush the spirit of any entrepreneur. But this obfuscates the real-world context in which the Health Care Ordinance operates and misleads the Court. All across America and in San Francisco, medium-sized business owners comply with myriad

labor and employment laws, many of them far more onerous than the Health Care Ordinance, and many of which already require the same records.

As a business owner, Zazie's owner is accustomed to complying with and keeping up to date with multiple laws, including federal, state and local tax laws and minimum wage laws. These laws all require calculations, record keeping, and reporting. Zazie also pays and tracks contributions to employee benefits such as Worker's Compensation and an employee 401(k) plan. As a restaurant, Zazie must also comply with a host of other local, state, and federal laws, including Occupational Safety and Health Administration (OSHA) standards and California Department of Public Health Food Safety Program regulations and guidelines. Taken in the context of the responsibilities medium-sized business owners routinely accept, adhering to the minimal requirements of the Health Care Ordinance is no burden.

Comparing quarterly hours worked to health care expenditures is no more burdensome than fulfilling the requirements of other laws. The San Francisco Minimum Wage Ordinance, for example, requires businesses to document hours worked, maintain payroll records for four year periods, and allow the City to monitor compliance. *See* S.F. Admin. Code §12R.5(c). Moreover, Zazie already records its employees' hours to comply with the Minimum Wage Ordinance and other laws. Keeping track of health care expenditures is also independently required in order to qualify for the federal income tax exclusion

for employer-provided health insurance, Internal Revenue Code, 26 U.S.C. §106(a).

Zazie has only one location, but restaurants with multiple locations routinely comply with other regulations that differ from jurisdiction to jurisdiction, including for employees who work in more than one location. *See, e.g.,* S.F. Admin. Code §12R; Oakland Mun. Code §2.28.030 (differing minimum wage ordinances in the neighboring cities of San Francisco and Oakland).

Considered in the context of the other laws with which Zazie must comply, the Health Care Ordinance adds insignificant administrative responsibilities.

C. The Health Care Ordinance Gives Zazie Choice and Flexibility.

The Health Care Ordinance gives employers a broad range of choices: pay the City of San Francisco to fund employee participation in the Health Access Program (Healthy San Francisco) or medical reimbursement accounts, purchase private insurance coverage, direct expenditures into a self-funded plan, contribute to health savings or reimbursement accounts, reimburse employees for health care services received, or deliver health care services directly. OLSE Reg. No. 4.2(A). Zazie provides direct coverage to its employees through a Kaiser health plan.

Not only does the ordinance give Zazie a choice of how to comply, it also allows employers like Zazie to

tailor benefits to the needs of their employees. With advice from the insurance broker who provides Zazie's liability and umbrella coverage, Zazie elected to cover the restaurant's employees through Kaiser. Because the staff is young and healthy but has limited savings, Zazie chose a comprehensive plan with relatively high co-payments ($30 for full-time employees and $50 for part-time employees) but a $1500 cap on out-of-pocket payments. Zazie pays just over $50,000 for this coverage. After one year, Zazie found that the $1 per customer surcharge was more than enough to cover the Kaiser premiums, so in April 2009 Zazie added dental insurance. The Health Care Ordinance gives Zazie the flexibility to make coverage decisions as it pleases.

The economic impact of the recession caused Zazie to consider paying into Healthy San Francisco instead of continuing the Kaiser coverage though Zazie's owner ultimately decided to keep the Kaiser plan. Zazie finds both options equally simple, and sees no obstacle to switching between them.[8]

Many other medium-sized business owners chose to pay into Healthy San Francisco because it was the cheaper option. Indeed, midway through 2008 over 700 employers had chosen to pay into the city plan,

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[8] Indeed, Medjool has chosen to provide a Kaiser plan to some employees and pay the City for others.

contributing $26 million on behalf of 31,000 workers.[9] Other restaurant owners opened Health Reimbursement Accounts for their employees. Congress did not intend ERISA to preempt an ordinance that, similar to a minimum wage law with a benefits component, simply sets a floor for health care expenditures while giving employers choice and flexibility.

II. THE ORDINANCE BENEFITS THE PUBLIC AND PROTECTS WORKERS WHO RISK LOSING THEIR HEALTH AND EVEN THEIR LIVES WITHOUT IT.

Zazie's staff is young and healthy but in 2008 an employee who had been with the restaurant for almost a decade called in sick because his stomach hurt. Having only ever received uncompensated care at the public hospital, he questioned what he should do with the Kaiser card Zazie had given him. Moreover, based on previous, negative encounters with the health care system as an uninsured patient, he was loath to go to Kaiser. When his pain drove him to seek care at the Kaiser hospital anyway, he was admitted immediately with appendicitis. He had brought with him $6000 of his personal savings in cash, because he feared he would have to pay upfront for his medical care as a condition of treatment. Because he had

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[9] Mitchell Katz, Nat'l Acad. for State Health Policy and State Coverage Initiatives, *Providing Universal Access to Care: Healthy San Francisco* (2009), *available at* http://www.nashp.org/files/ERISAwebcast_020609.pdf.

health coverage, he was charged only his Kaiser co-insurance and averted not just a severe threat to his health but also a $27,000 financial catastrophe. His positive experience with the health care system is one he now recounts to his co-workers, friends, and family thereby encouraging them to access health care when they need it as well. Not only does this benefit the individuals involved, but it also spares taxpayers the great expense of uninsured emergency room care.[10]

Access to health care for restaurant employees has public health implications as well. More than half of all foodborne illness outbreaks reported in the United States are associated with restaurants.[11] Just one sick restaurant worker can infect scores of customers. For instance, the Centers for Disease Control and Prevention reported that in 2006, restaurant

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[10] The typical cost of an appendectomy at San Francisco General Hospital totals more than $19,000. Emergency room visits by uninsured patients at San Francisco General Hospital declined by 70% from 2007 to 2008 (29,976 in the second quarter of 2007 and 8,944 in the second quarter of 2008). Data from the first quarter of 2009 show 5,560 visits, a 81% decline in emergency room visits since 2007. Healthcare Information Division, Office of Statewide Health Planning and Development (OSHPD), State of California, *Hospital Quarterly Financial and Utilization Data Files* (2007-2009), *available at* http://www.oshpd.state.ca.us/hid/Products/Hospitals/QuatrlyFinanData/CmpleteData/default.asp.

[11] Timothy F. Jones & Frederick J. Angulo, *Eating in Restaurants: A Risk Factor for Foodborne Disease?*, 43 Clinical Infectious Diseases 1324 (2006).

workers in a Michigan restaurant likely infected over three hundred and fifty patrons with the norovirus.[12]

A review of foodborne disease outbreaks resulting from contamination by food-service employees found that 89% of the outbreaks occurred at food service establishments and 93% of them involved employees who were ill either prior to or at the time of the outbreak.[13] In San Francisco and Los Angeles counties, between 11 and 12% of disease outbreaks involve an ill food service worker.[14] In the absence of an employer contribution requirement, restaurant workers with no health benefits may delay seeking medical care or avoid care altogether.[15]

The Health Care Ordinance plays a crucial role in protecting the health of workers and the public without imposing unreasonable financial burdens on individuals, taxpayers or employers.

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[12] Centers for Disease Control and Prevention, MMWR No. 56, *Norovirus Outbreak Associated with Ill Food-Service Workers Michigan, January-February 2006*, 1212 (2007).

[13] Jack Guzewich & Marianne P. Ross, Food and Drug Admin., *Evaluation of Risks Related to Microbiological Contamination of Ready to-eat Food by Food Preparation Workers and the Effectiveness of Interventions to Minimize Those Risks* (1999).

[14] *Public Health Impacts on the Healthy Families Act: Hearing on H.R. 2460 Before the Comm. on Educ. and Labor*, 110th Cong. 6 (2009) (statement of Rajiv Bhatia, Director, Occupational and Environmental Health, San Francisco Department of Public Health).

[15] *See generally* Jones & Angulo, *supra* note 11.

III. THE ORDINANCE LEVELS THE PLAYING FIELD FOR COVERED BUSINESSES WITH MINIMAL ECONOMIC IMPACT ON THEM.

Employer contribution requirements are widely accepted policy solutions to the problem of the working uninsured, and indeed have featured prominently not only in local and state health reform efforts but also in national health reform proposals dating back to the Nixon administration in the 1970s and, more recently, to the 1990 report of the Pepper Commission (the Bipartisan Commission on Comprehensive Health Care). Maintaining workplace insurance among employers willing to continue providing it, while creating a relatively low-cost alternative for employers that do not, is an idea with bipartisan support that has appeared in health care reform proposals from leading business groups.[16] Current health reform efforts include Congressional proposals with employer contribution requirements.

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[16] Ken Jacobs & Jacob S. Hacker, Berkeley Ctr. on Health, Econ. & Family Sec., *How to Structure a "Play-or-Pay" Requirement on Employers: Lessons from California for National Health Reform* (2009).

A. Employer Mandates Protect Employers Like Zazie from Cost Shifting and Adverse Selection.

Maintaining the structure of the employer mandate in the Health Care Ordinance makes good policy sense. Employer contribution requirements level the playing field in several ways.

First, when some employers fail to provide health care coverage to their employees, or provide it only to an upper-echelon minority, it is well-documented that this shifts costs onto employers that do provide coverage.[17] When uninsured individuals use health care services and cannot pay for them, health care providers make up for the uncompensated care by charging health insurers more for insured patients than what it actually costs to care for them. Insurance companies in turn shift those cost increases onto employers in the form of higher premiums.[18] The cost shift is significant, amounting to a national average of $1,100 per family premium and $410 per

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[17] Ben Furnas & Peter Harbage, Ctr. for Am. Progress Action Fund, *The Cost Shift from the Uninsured* (2009); Families USA, Pub. No. 05-101, *Paying a Premium: The Added Cost of Care for the Uninsured* (2005); Inst. for Health Policy Solutions, *Covering California's Uninsured: Three Practical Options*, Cal. HealthCare Found. (2006); Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, *in* Issue Brief: New Am. Found. 2006 (New Am. Found. Health Policy Program No. 3, 2006).

[18] Furnas & Harbage, *supra* note 17.

individual premium; by 2013, it is expected to increase to $1,300 and $480, respectively.[19] In California, the cost shift or excess payment by employers that provide coverage to compensate for those that do not is already $1,400 per family premium and $500 per individual premium.[20]

Second, employers that provide no coverage to their employees shift costs onto employers that provide spousal and dependent coverage.[21] Employers resent the financial burden this cost-shifting creates. Employers surveyed in twelve nationally representative metropolitan communities "complained that they . . . were 'subsidizing' other employers."[22] The Health Care Ordinance alleviates the burden on employers that wish to cover their employees.

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[19] *Id.*

[20] *Id.*

[21] *See* Eric E. Seiber & Curtis S. Florence, U.S. Small Bus. Admin., *Changes in Family Health Insurance Coverage for Small and Large Firm Workers and Dependents: Evidence from 1995 to 2005* (2009) (finding that in 2005, 47% of small-firm workers with a large-firm spouse, and 23.5% with a small-firm spouse, were covered as dependents); *see also* Henry J. Kaiser Family Foundation, *Fact Sheet: Women's Health Insurance Coverage* (2008) (finding that "[a]lthough job-based coverage rates are similar for women and men, women are less likely to be insured through their own job (39% vs. 49%, respectively) and more likely to have dependent coverage (25% vs. 13%)").

[22] Lydia E. Regopoulos & Sally Trude, *Employers Shift Rising Health Care Costs to Workers: No Long-term Solution in Sight*, *in* Issue Brief: Findings from HSC 2004 (Ctr. For Health Sys. Change No. 83, 2004).

Finally, without an employer expenditure requirement, employers that do provide health care coverage face increased costs through the effects of adverse selection, as sicker employees who cost more tend to seek out jobs with better benefits.[23]

By spreading the cost of employee health care among all medium and large employers rather than burdening just a few good actors with the cost of care, the Health Care Ordinance creates a level playing field for business.

B. The Health Care Ordinance Allows Zazie To Provide Health Coverage to Its Employees Without Facing a Competitive Disadvantage.

Employers that do not provide health care benefits have lower hourly employee wage costs than those that provide such benefits, and absent a level playing field can therefore compete with lower prices. Before the ordinance went into effect, Zazie wanted to provide health coverage to all its employees but could not because doing so would have put the restaurant at a competitive disadvantage. Zazie estimates that the cost of health care would amount to 50% of its profits were it not for the level playing field created by the ordinance. Zazie now fully funds the cost of health care through a $1 surcharge for every

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[23] Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 Am. Econ. Rev. 177 (1989).

customer, a practice that 25% of all San Francisco restaurants have now adopted in some form.[24] It is safe to assume that most other restaurants also pass on the cost to their customers through more traditional means, such as raising prices.

In addition, the majority of employers that fail to cover all or most of their employees – including most GGRA members before the ordinance went into effect[25] – operate in industries in which their competitors do not offer coverage to all employees either.[26]

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[24] The typical surcharge is 4% of the bill though some restaurants like Zazie use a specific dollar amount instead. Carrie Colla, William H. Dow & Arindrajit Dube, UC Berkeley School of Public Health, *How Do Employers React to a Pay-or-Play Mandate? Early Evidence from San Francisco*, Mimeo (2009). Other industries would be expected to pass on health care costs in the form of price increases, as happens in response to minimum wage requirements. *See* Daniel Aaronson, *Price Pass-Through and the Minimum Wage*, 83 Rev. Econ. & Stat. 158 (2001).

[25] The most recent data available from a GGRA survey show that in 2005, 86% of restaurants answering the survey offered health insurance to at least some of their employees. Of these, almost 60% offered health insurance to their full-time employees (those working thirty-six hours or more per week), 25-30% offered health insurance to their part-time employees working twenty to thirty-five hours per week, and 2% offered health insurance to their part-time employees working fewer than twenty hours per week. Kent Sims, Golden Gate Rest. Ass'n, *Economics of the San Francisco Restaurant Industry* (2005), *available at* http://www.ggra.org/PDFS/Ec%20Study%2005.pdf.

[26] *See* Arindrajit Dube & Michael Reich, Univ. of Cal. Inst. for Labor and Employment, *2003 California Establishment Survey: Preliminary Results on Employer Based Healthcare Reform*

(Continued on following page)

Zazie wanted to provide health insurance to all its employees before the Health Care Ordinance passed, but had no rational way to do so. Raising food prices would put the restaurant at a competitive disadvantage, and the $1 surcharge that Zazie has now adopted functions only because other restaurants in the city pass on health care costs to customers as well.

The Health Care Ordinance ensures fair, across-the-board requirements for employers. Indeed, research demonstrates conclusively that restaurants in San Francisco experience no ill effects from the Health Care Ordinance.[27] The ordinance creates an opportunity for employers that wish to cover their employees: it allows Zazie to pass on the cost of health care to customers without impact on its ability to compete.

(2003) (finding that retail, restaurants, hotels, construction, and business services comprise the industry sectors with the greatest share of the uninsured).

[27] A comparison of San Francisco businesses to those in surrounding areas found no indication that overall employment, or employment in the restaurant industry, grew any slower in San Francisco than in comparable surrounding areas after the Health Care Ordinance passed. Colla, Dow & Dube, *supra* note 24.

C. Despite Petitioner's Representations to the Contrary, Most Medium-Sized Business Owners Support Employer Contribution Proposals Like the Health Care Ordinance that Have Minimal Economic Impact on Employers.

In a level-playing-field context, Zazie can provide health care to its employees with no economic impact. Zazie covers the cost of employee health care entirely through a simple $1 surcharge. Indeed, the $1 surcharge funds not only Zazie's Kaiser plan but also dental coverage. Fewer than 1% of Zazie's customers have complained or even inquired about the surcharge and most who do ask out of curiosity. Zazie reports full customer support for the surcharge and the Health Care Ordinance.

Notably, a report by Small Business Majority California found widespread support for an employer contribution requirement from California business owners employing fewer than 100 employees: among respondents, fully 80% of business owners (including 76% that did not currently offer insurance and 84% that did) felt that "employers should pay something to provide healthcare to their employees."[28] Other

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[28] Small Bus. for Affordable Healthcare, Small Bus. Majority, *California Small Bus. Healthcare Survey* (2007).

employer surveys yield similar findings.[29] GGRA does not fairly represent employer sentiment.[30]

D. Employer Mandates Play an Essential Role in Preventing Crowd Out.

Public policy considerations support employer mandates to reduce "crowd out," or the temptation for employers to drop the private insurance coverage they do offer when other options become available to their employees. Were the employer contribution requirement to be struck down and the Healthy San Francisco program to remain, as Petitioner advocates, San Francisco would be left with a publicly-funded program in which uninsured San Francisco residents could enroll at great cost to taxpayers. This would create powerful incentives for employers that currently offer coverage to their employees to drop the

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[29] *See* San Mateo County Blue Ribbon Task Force on Adult Health Care Coverage Expansion, *Opinion Research Regarding Health Coverage Expansion* (2007), *available at* http://www.co.sanmateo.ca.us (56% of business respondents in San Francisco's neighboring county support a plan in which all employers must meet minimum health spending standards by offering health insurance or paying into a county fund, and 72% support a plan like San Francisco's that exempts employers with fewer than twenty employees). *See also* Dube & Reich, *supra* note 26 (64% of business respondents support proposals that require employers to either provide health insurance or pay a fee into a state fund to cover the uninsured and 59% that currently do not offer health insurance also support such a proposal).

[30] Nor does GGRA fairly represent the sentiment of its members as *amicus* Medjool demonstrates.

coverage in favor of the Healthy San Francisco option – now entirely free to them. Crowd out "is much more likely when employers are *not* required to contribute a meaningful amount to the cost of covering their uninsured workers, because the cost of allowing their workers to be covered through subsidized options is so much lower."[31]

Other employer contribution options, such as an across the board payroll tax with subsidies for the Healthy San Francisco program, would frustrate the employer flexibility goal of the Health Care Ordinance and effectively force employers like Zazie to drop private insurance in favor of the publicly subsidized option. Besides encouraging crowd out, a payroll tax would also create labor market distortions and penalize employers that offer higher wages.

In sum, employer contribution requirements benefit business and the economy. Expanding access to health care raises productivity by improving workers' health, increasing their participation in the labor force, decreasing absenteeism and disability, reducing insurance-related "job-lock," and allowing an overall better match between employer needs and employee skills.[32] By expanding access to health care, employer contribution requirements reduce the likelihood that employees will forego necessary medical

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[31] Jacobs & Hacker, *supra* note 16.

[32] *Id.*

care or treatment for chronic conditions.[33] They protect employers from cost-shifting and adverse selection, allow employers to cover their employees without unfair competition, and prevent crowd out. They also enjoy broad business-community support. The Health Care Ordinance is good public policy.

CONCLUSION

The Court should not take up the issues presented in this case. At every level of the proceedings, Petitioner has failed to support the assertions it now makes. Instead, Petitioner and its allies present dire and improbable predictions based on mere speculation. The Health Care Ordinance is a straightforward employer expenditure requirement grounded in sound policy with real benefits to employers, employees, and the public.

[33] *Id.*

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Zazie and Medjool

August 24, 2009

HEALTHCARE SECURITY ORDINANCE EMPLOYER REGISTRATION AND ANNUAL REPORTING FOR 2008

RETURN TO: SAN FRANCISCO OFFICE OF LABOR STANDARDS ENFORCEMENT
P.O. BOX 7378
San Francisco, CA 94120-7378

FOR ASSISTANCE: Refer to the enclosed instructions, visit http://www.sfgov.org/olse/hcso, or call (415) 554-7892

Business Certificate Number

Business Name and Address

DELINQUENT AFTER 1/31/2009

Covered Employers must complete all of the questions below. Failure to do so shall constitute a violation of § 14.3(b) of Chapter 14 of the SF Admin. Code. Violators shall be subject to penalties and other corrective action.

IF THIS CFC # HOOP RIGHT YOU ARE FILING THIS FORM ON BEHALF OF MORE ENTITIES W/ THE SAME OWNERSHIP

	For each quarter, enter the following information:	1st Quarter January to March 2008	2nd Quarter: April to June 2008	3rd Quarter July to September 2008	4th Quarter: October to December 2008
A	**Number of Employees Employed per Week (anywhere):** *NOTE: Employers with 19 or fewer employees are NOT covered by the HCSO and should NOT complete or file this form*	○ 20-49 ○ 100-499 ○ 50-99 ○ 500+	○ 20-49 ○ 100-499 ○ 50-99 ○ 500+	○ 20-49 ○ 100-499 ○ 50-99 ○ 500+	○ 20-49 ○ 100-499 ○ 50-99 ○ 500+
	IMPORTANT: Time and Expenditure Data for Employees Covered by the HCSO				
B1	**Total Number of "Covered Employees":** *Do not count employees exempt from coverage under this law, see instructions for more details.*				
B2	**Total Number of Employees Exempt From Coverage Under the HCSO,** *including those who have signed Voluntary Waivers*				
C	**Total Number of Hours Paid to All Covered Employees**: *Hours paid includes both hours worked and hours for which covered employees were entitled to be paid wages, such as paid vacation hours, paid time off, and paid sick leave hours, but not exceeding 172 hours/month or 516 hours/quarter.*	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
D	**Total Amount of Health Care Expenditures Made for All Covered Employees** (in whole dollars; do not include commas or cents)	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
E	**Breakdown of Health Care Expenditures Made by the Employer:** *Count each covered employee only once per quarter; if your business made more than one type of health care expenditure for an employee, count that employee in the category in which the largest health care expenditure was made.*				
E1	**Number of Covered Employees enrolled in group health insurance coverage**				
E2	**Number of Covered Employees enrolled in self-insured group health plan.** *Please review the instructions to determine if your plan meets the definition of a self-insured plan.*				
E3	**Number of Covered Employees enrolled in health/medical reimbursement, spending, or savings account administered by a third party vendor**				
E3(a)	*Total annual dollar amount of funds made available to Covered Employees for 2008 – how much the employer made available via third-party health/medical reimbursement, spending, or savings accounts (in whole dollars; do not include commas or cents)*	$			
E3(b)	*Total annual dollar amount of reimbursements made to Covered Employees for 2008 – how much employees were reimbursed via third-party health/medical reimbursement, spending, or savings accounts (in whole dollars; do not include commas or cents)*	$			
E4	**Number of Covered Employees for whom the employer provided direct reimbursement or made direct payments for health care expenses**				
E4(a)	*Total annual dollar amount of funds made available to Covered Employees for 2008 – how much the employer made available for direct reimbursements or payments*	$			
E4(b)	*Total annual dollar amount of funds spent for Covered Employees for 2008 – how much Covered Employees were reimbursed and/or how much was paid directly by the employer for Covered Employees' health care expenses (in whole dollars; do not include commas or cents)*	$			
E5	**Number of Covered Employees for whom payment was made for the City Option** *(includes both Healthy San Francisco and the City's Medical Reimbursement Account)*				
E6	Other: *(describe)*				

By submitting this report the above-named employer certifies the following: (1) that the information on this reporting form is correct; (2) that all compensable hours paid to the employees who performed work in the geographic boundaries of the City and County of San Francisco during the period covered by this report are reported herein; (3) that this report, whether or not signed in the space provided below, is being submitted by the employer or duly authorized representative of the employer. Under the laws of the State of California, I declare under penalty of perjury that I have read the foregoing and that it is true, correct, and complete to the best of my knowledge and belief.

3664

SIGN HERE _____ DATE _____, 2009

PRINT NAME_____ TELEPHONE_____

App. 1